

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
Rural Broadband Experiments)	WC Docket No. 14-259

To: The Commission

**APPLICATION FOR REVIEW OF
ORDER AND ORDER ON RECONSIDERATION**

Pursuant to Section 1.115 of the Commission’s rules,¹ Lake Region Electric Cooperative (Lake Region)² seeks review of the Wireline Competition Bureau’s (Bureau) August 15, 2016 Memorandum Opinion and Order and Order of Reconsideration (*Waiver Order*).³ As explained below, the *Waiver Order* fails to apply existing law and frustrates the Commission’s mission of closing digital divides on Tribal lands. Lake Region has diligently complied with all the requirements to receive funding, including receiving designation as an eligible telecommunications carrier (“ETC”). The only impediment to Lake Region being authorized to receive universal service funding to deploy fiber on Tribal Lands is because it obtained a letter of credit (“LOC”) commitment letter from the National Rural Utilities Cooperative Finance

¹ 47 C.F.R. §1.115(b)(2)(i) (“The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy”).

² This filing by Lake Region is being submitted on behalf of itself and Lake Region Technology Communications, LLC, its wholly-owned subsidiary that was established to provide high speed Internet access, voice and video services (collectively “Lake Region”). This subsidiary is the rural broadband experiment applicant.

³ *Connect America Fund; Rural Broadband Experiments*, WC Docket Nos. 10-90 and 14-259, Order and Order on Reconsideration, DA 16-926 (Wireline Comp. Bur., Aug 15, 2016) (*Waiver Order*). Lake Region is not seeking review of the Bureau’s decision to deny the unsuccessful challenge regarding the exclusion of certain census blocks from Lake Region Category 1 application. This Application for Review is limited to the Bureau’s decision denying Lake Region’s request that the CFC be eligible to issue a letter of credit in support of its provisionally-accepted rural broadband experiment bid. As a result, if the application for review is granted, Lake Region would receive \$451,593.13 (instead of \$591,987.00).

Corporation (“CFC”) – a financial institution the FCC has now deemed eligible to do so.

The Commission should reverse the Bureau’s decision and approve Lake Region’s application to further the goals of universal service and connect consumers living on Tribal land with high capacity broadband service.

INTRODUCTION

Lake Region is a member-owned, not-for-profit electric distribution cooperative headquartered in Hulbert, Oklahoma; incorporated in 1949. Lake Region’s service area is approximately 1,130 square miles of Tribal lands in Northeast Oklahoma which includes portions of the followings counties: Cherokee, Wagoner, Muskogee, Rogers, Mayes, Adair, and Sequoyah. Lake Region has over 24,000 residential, commercial and industrial consumers and 72 employees. Lake Region offers broadband at speeds ranging from 20 Mbps, 50 Mbps to 100 Mbps to a portion of its territory and is looking to expand throughout its service area. In addition to offering broadband, Lake Region offers IP-TV and VoIP services.

In July 2014, to “advance the deployment of voice and broadband-capable networks in rural, high-cost areas, including extremely high-cost areas,” the Commission authorized \$100 million of universal service support to fund “rural broadband experiments in price cap areas that will deploy new, robust broadband to consumers.”⁴ The Commission established a competitive bidding process to select projects in three separate categories from entities interested and willing to deploy broadband to areas deemed eligible.⁵ In addition, “[r]ecognizing the unique challenge in serving Tribal lands,” the Commission adopted a bidding credit for entities that proposed projects serving Tribal census blocks to encourage deployment on Tribal lands.⁶

⁴ See *Connect America Fund; ETC Annual Reports and Certifications*, WC Docket Nos. 10-90 and 14-58, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8769, 8770, para. 1 (2014) (*Rural Broadband Experiments Order*).

⁵ *Id.* at 8786-93, paras. 51-71.

⁶ *Id.* at 8781, para. 31; 8784, paras. 43-44.

Further, to ensure that entities had “the technical and financial qualifications to successfully complete the proposed project within the required timelines and is in compliance with all statutory and regulatory requirements,” the Commission also established a post-selection review process.⁷ Among other things, provisionally selected bidders were required to submit a letter from an acceptable bank committing to issue an irrevocable stand-by LOC in the amount of the provisionally selected bid (commitment letter) by an authorized bank. The Commission required a LOC to “protect the integrity of universal service funds that have been disbursed” because support can be “immediately reclaim[ed]” to the extent a provider defaulted or otherwise did not comply with the Commission’s rules.⁸ Applicants also had to submit documentation of their designation as an ETC in selected areas.

On November 6, 2014, Lake Region submitted its application for seven (7) Category 1 rural broadband experiment projects looking to deploy fiber in 253 census blocks on Tribal lands in Oklahoma. Lake Region filed its financial and technical information on January 2, 2015.

On March 4, 2015, the Bureau announced that Lake Region had been provisionally selected for two projects as a Category1 bidder for \$591,987.00 of universal service support for 68 census blocks.⁹ All census blocks in Lake Region’s selected projects are designated as Tribal. On April 24, 2015, Lake Region submitted its LOC commitment letter from the CFC. Although CFC did not fit within the definition of an approved financial institution at the time, the LOC commitment letter makes clear that CFC would “arrange for an irrevocable Stand-by Letter of

⁷ *Id.* at 8787, para. 52.

⁸ *Id.* at 8788-8789, para. 56. The Commission expanded the number of banks eligible to issue a Letter of Credit from the Mobility Fund, which was the first time the FCC had required a Letter of Credit. *Id.* at 8790, para. 59 (“The criteria we adopt are largely the same as the requirements the Commission adopted for Mobility Fund Phase I and Tribal Mobility Fund Phase I, although we adopt several modifications to enlarge the potential pool of eligible banks for purposes of these experiments.”).

⁹ *See Wireline Competition Bureau Announces Additional Provisionally Selected Bidders for Rural Broadband Experiments and Sets Deadlines for Submission of Additional Information*, WC Docket Nos. 10-90, 14-259, 30 FCC Rcd 2045-46 (2015).

Credit” which “is expected to be issued by US Bank or another financial institution (“Issuing Bank”) deemed acceptable to the FCC on CFC’s behalf.” Thus, the LOC commitment letter confirmed that Lake Region would be obtaining the LOC from US Bank¹⁰ or other financial institution acceptable to the FCC, as required under the *Rural Broadband Experiments Order*.¹¹ On May 29, 2015, the Corporation Commission of Oklahoma designated Lake Region as an ETC.¹² Thus, Lake Region has complied with all the requirements to receive funding and stands ready and able to complete the projects for which it was provisionally accepted.

On April 24, 2015, Lake Region, submitted its Petition for Waiver requesting that the CFC be eligible to issue an LOC in support of Lake Region’s application, emphasizing the challenges faced by Lake Region in establishing banking relationships with eligible financial institutions.

In May 2016, the Commission determined that the CFC had demonstrated that it had possessed both the financial resources and creditworthiness equivalent to the Top-100 US Banks, concluding that it was in the public interest that the CFC be eligible to issue LOCs.¹³ In so doing, the Commission noted that the CFC is “the largest non-governmental lender for rural utilities,” and “has specialized institutional knowledge regarding the types of entities that we

¹⁰ As of March 31, 2015, US Bancorp was listed as the 5th largest bank in the United States by the Federal Reserve. Federal Reserve Statistical Release, Large Commercial Banks as of March 31, 2015, <https://www.federalreserve.gov/releases/lbr/20150331/default.htm> (last viewed on September 12, 2016). US Bank National Association (US Bank) is the 5th largest commercial bank in the United States, wholly-owned by US Bancorp. See US Bancorp Corporate Profile, <http://phx.corporate-ir.net/phoenix.zhtml?c=117565&p=irol-homeprofile> (last viewed on September 12, 2016). Because Lake Region’s commitment letter therefore complied with the terms of the Commission’s rules, the Commission could grant the Application for Review on these grounds alone.

¹¹ See *Rural Broadband Experiments Order*, 29 FCC Rcd 8769, 8787, para. 54 (2014).

¹² See, *Final Order Designating Lake Region Technology & Communications, LLC as an Eligible Telecommunications Carrier*, Cause No. PUD 201500082, Order No. 641086, Corporation Commission of Oklahoma (uploaded to Lake Region’s FCC Form 5620 on May 29, 2015).

¹³ See *Connect America Fund et al.*, WC Docket Nos. 10-90, 14-50, and 14-259, Report and Order and Further Notice of Proposed Rulemaking, FCC 16-64, at paras. 126-130 (rel. May 25, 2016)(*Phase II Competitive Order*). The *Phase II Competitive Order* was published in the Federal Register on July 7, 2016 and became effective on August 8, 2016. 81 Fed. Reg. 130,44414 (July 7, 2016).

expect will participate in universal service competitive bidding to serve fixed locations, and has demonstrated that it has significant and long-term experience in financing the deployment of rural networks.”¹⁴ The Commission also found that the CFC’s “unique and longstanding role in rural network deployment coupled with CFC’s significant participation in other rural federal government programs, its substantial assets, and its sustained credit rating, provides us with sufficient assurance that CFC has the qualifications to assess the financial health of potential bidders and honor the letters of credit that it issues at the request of these bidders.”¹⁵

On August 15, 2016, despite the fact the Commission had previously determined that the CFC is eligible to issue LOCs, the Bureau dismissed Lake Region’s Petition for Waiver.¹⁶ In so doing, the Bureau failed to apply existing rules as required by long-standing precedent; it also denied residents living on Tribal lands access to broadband thereby frustrating the goals of the universal service fund without any countervailing benefits.

DISCUSSION

1. The Bureau Committed a Fatal Legal Error By Failing to Consider Rules and Policies in Effect When The Order Was Adopted

The *Waiver Order* should be reversed for failing to follow the rules in effect when the Bureau rendered its decision. It is well-settled that a court must “apply the law in effect at the time it renders its decision.”¹⁷ This principle applies equally to changes in rules and policies adopted by regulatory agencies even when (i) the old policy, rule or eligibility requirement was in effect when an application, petition or other filing was submitted to an agency, (ii) the new rule is in effect for only a brief period of time, or (iii) the agency could have moved more quickly

¹⁴ *Id.* at para. 130.

¹⁵ *Id.*

¹⁶ *Waiver Order*, para 7.

¹⁷ *Landgraf v. USI Film Prods*, 511 U.S. 244, 264 (1994) (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974)).

to resolve a pending application (or waiver request) prior to adopting the new rule of general applicability, but did not do so.

In *Bellsouth Telecomms, Inc. v. Southeast Tel., Inc.*, the United States Court of Appeals for the Sixth Circuit reversed the District Court's decision with instructions to vacate the order of the Kentucky Public Service Commission (PSC) based on the principle that the agency must rule on a pending application based on the law in effect when it issues its decision.¹⁸ The PSC had granted Southeast Tel's intention to elect certain provisions in an existing BellSouth interconnection agreement under the FCC's "pick and choose" rule that was in effect when the competitive local exchange carrier (CLEC) filed its intention with the PSC to elect certain provisions of an existing BellSouth interconnection agreement. However, after Southeast Tel filed with the PSC, the Commission adopted its "all-or-nothing" rule for CLECs opting to elect existing interconnection agreements because the Commission had identified serious deficiencies with "pick-and-choose."¹⁹ The Sixth Circuit held that inasmuch as the Commission's "all-or-nothing" rule was in effect when the PSC issued its decision, the PSC was obligated to apply that rule.²⁰ In addition, the Court summarily dismissed arguments that "but for" BellSouth filing an objection to Southeast Tel's filing or the PSC not acting more quickly, the PSC would have approved Southeast Tel's application when the "pick-and-choose" rule was in effect.²¹

¹⁸ *Bellsouth Telecomms, Inc. v. Southeast Tel., Inc.*, 462 F. 3d 650 (6th Cir. 2006).

¹⁹ *Id.* at 654.

²⁰ *See id.* at 659.

²¹ *See id.* at 666; *see also Pine Tree Med. Assocs. v. Sec. of Health and Human Servs.*, 127 F3d 118 (1st Cir. 1997), in which the First Circuit affirmed the lower court's grant of summary judgement in favor of the Secretary of Human and Health Services (HHS) in which HHS denied Pine Tree Medical Services' application requesting funding to serve a "medically underserved population" (MUP) as provided under the Public Health Service Act. To the extent a health care provider offers services to a MUP, it is entitled to enhanced funding levels. Pine Tree filed its application under guidelines then in effect that would have designated the community as a MUP. However, before the application was granted, HHS revised guidelines correcting a major deficiency for designating MUPs. As the revised guidelines were in effect, the First Circuit held that HHS properly applied the new guidelines. A similar result was reached in *Combs v. Comm'r of Soc. Sec.*, 459 F.3d 640 (6th Cir. 2006). The Sixth Circuit affirmed the decision of a

In this case, the law in effect at the time permitted CFC to issue LOCs.

The Commission's *Phase II Competitive Order* that found that CFC is eligible to issue LOCs was effective on August 8, 2016. The Bureau released the *Waiver Order* on August 15, 2016. Importantly, the *Phase II Competitive Order* clarified that CFC would be eligible to issue LOCs to both winning bidders under the Phase II auction and participants under the rural broadband experiments.²² Because the Bureau acted on Lake Region's petition for waiver when CFC was eligible to issue LOCs, it was obligated to "apply the law in effect" and grant Lake Region's waiver petition.

2. The Bureau's Decision Frustrates Commission Policy With No Countervailing Public Interest Benefits

Most concerning, the *Waiver Order* is not in the public interest because it fails to further any Commission goal while denying much-needed broadband deployment on Tribal lands. Lake Region has diligently complied with the rural broadband experiment rules, and is ready, willing and able to complete the projects for which it was provisionally accepted if the Commission reverses the Bureau's decision.

The *Waiver Order* does not help protect the integrity of the universal service fund, which was the reason the Commission required applicants to obtain a LOC. In this case, Lake Region submitted a timely LOC commitment letter by CFC, a financial institution now eligible to do so. The Commission therefore has assurances that the integrity of the fund is protected should Lake

Social Security administrative law judge holding that an applicant seeking disability benefits for obesity was not entitled to a presumption in favor of receiving benefits because the presumption for obesity had been deleted after the individual filed its application.

²² *Phase II Competitive Order*, at n.262 (the Commission dismissed as moot the petitions for waivers filed by CFC and two authorized rural broadband experiment bidders, noting that CFCs eligibility to issue LOCs extended to rural broadband experiment participants on a going-forward basis). This decision makes clear that all authorized rural broadband experiment winners may obtain updated LOCs from an eligible institution other than the initial issuer of the LOC. In addition, LOCs must be renewed at least annually in amounts equal to the previously disbursed funds and the disbursements for the next twelve months. *Rural Broadband Experiments Order*, 29 FCC Rcd 8769, 8790-8791, paras. 61-62.

Region not fulfil its obligations. Thus, the denial furthers no policy goals but, in fact, undermines the agency's efforts to achieve universal service.

Moreover, the Bureau's concerns about inequities are unfounded. Preliminarily, such a sweeping conclusion, even in the context of an auction, essentially reads section 1.3 out of the Commissions' rules. Section 1.3 of the Commission rules expressly permits persons to seek waiver of a rule, requirement or eligibility limitation.²³ The Commission's *Rural Broadband Experiments Order* did not prevent parties from seeking waivers. If the Commission did not intend for entities to seek waivers of these procedures, it could have done so. Lake Region did not request an advantage or preference, but followed the procedural rules to seek a waiver to the extent necessary to fully comply with the rules. Lake Region diligently obtained ETC designation and has completed all other criteria necessary to secure universal service funding it was provisionally awarded. The standard for waivers is "good cause" which has plainly been met here. Lake Region secured a LOC commitment letter from the CFC, which, in turn, was securing a LOC from a top 100 bank.

All selected and authorized winners of the rural broadband experiments are now able to use the CFC to issue LOCs as entities are free to modify, renew or obtain a new letter of credit, inasmuch as all LOCs must be renewed on an annual basis.²⁴ It is not only arbitrary and capricious but inequitable to deny Lake Region's request when the CFC is now authorized to do so and other selected and authorized rural broadband experiment winners can now use the CFC to perform this very same function.

The *Waiver Order* also frustrates Commission policy and the Chairman's stated goal of encouraging deployment on Tribal Lands. The Commission's most recent *Broadband Progress*

²³ 47 C.F.R. § 1.3.

²⁴ *Rural Broadband Experiments Order*, 29 FCC Rcd 8769, 8790-8791, paras. 61-62.

Report found that 68 percent of Americans living on Tribal lands in rural areas lack access to advanced telecommunications capability, defined as 25 Mbps/3 Mbps.²⁵ In this case, the deployment is the real challenge. In rural areas of Cherokee County, which is where Lake Region was provisionally selected as a winning bidder, 74 percent of the population lacks access to 25 Mbps/3Mbps.²⁶ Lake Region was selected as a provisional winner to connect unserved households in 68 of these census blocks.

Chairman Wheeler has committed to Congress that the Commission has executed, or is prioritizing, a broad range of initiatives to help improve and measure the availability and adoption of high-speed Internet on Tribal lands.”²⁷ And that “[t]he Commission is committed to facilitating the expansion of 21st century communications to Tribal Nations across the United States.”²⁸ The only reason Lake Region has not been issued funding to deploy robust broadband to these areas is because it obtained a LOC commitment letter from the CFC – a bank the FCC has deemed eligible to do so. Rather than promoting a public policy goal, the *Waiver Order* serves to continue to deny Tribal lands access to broadband.²⁹ To fulfill this commitment as well as further the Commission’s goal of achieving universal service, the Commission must reverse the *Waiver Order*.

²⁵ *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, 2016 Broadband Progress Report*, GN Docket No 15-191, 31 FCC Rcd 699, 732, Table 1(2016). The Commission is not alone in identifying the unique challenges confronting broadband deployment on Tribal lands. The Government Accountability Office (“GAO”) recently released a study highlighting the challenges and barriers to deploying and increasing access to broadband on Tribal lands. See GAO, *Additional Coordination and Performance Measurement Needed for High-Speed Internet Access Programs on Tribal Lands* – GAO 16-222 (January 2016), <http://www.gao.gov/assets/680/674906.pdf>.

²⁶ See *2016 Broadband Progress Report*, Appendix E, page 36.

²⁷ See Letter to The Honorable Thomas R. Carper, United States Senate, from Thomas Wheeler, Chairman, FCC, March 31, 2016, https://apps.fcc.gov/edocs_public/attachmatch/DOC-338778A1.pdf.

²⁸ *Id.*

CONCLUSION

For the reasons set forth above, Lake Region respectfully requests that the Commission reverse the *Waiver Order* and therefore enable Lake Region to deploy robust, high capacity broadband in rural, Tribal areas as it was provisionally selected to do.

Respectfully submitted,

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September 13, 2016